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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1934

No 342

MADISON L. MILLER, JR.,
Petitioner

vs.

THE UNITED STATES OF AMERICA,
Respondent

PETITIONER'S MOTION FOR REHEARING

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Comes now, Madison L. Miller, Jr., by his counsel, and moves this Honorable Court to grant a rehearing in this cause and thereupon set aside the judgment heretofore entered by this Court and reverse the judgment below, and assigns as cause therefor the following:

SUMMARY

1.

This Court apparently reached the announced decision in this case because certain principles either were not specifically called to the Court's attention, or were not emphasized as they should have been.

The undersigned counsel is perhaps subject to fair criticism for failing to call to the Court's attention and emphasize such principles. Such failure was due in part to oversight. It is believed the Court will not desire the Petitioner to be penalized and suffer a loss on this account. Neither will the Court desire to permit its opinion to stand unless upon a consideration of ALL the legal principles involved the Court feels certain its conclusions are correct. This is especially true in this case because the opinion materially affects several hundred thousand Government insurance contracts now in force, and in effect renders certain provisions therein contained inoperative. Such provisions are to the effect that the contract shall mature if the insured suffers certain amputations and other specific losses, named, including in the list the loss of use of one eye and one arm, and other similar combinations. It is believed the provisions in question are lawful and should be enforceable. Even if the Court should finally determine that under the facts of this case Petitioner may not recover, the scope and effect of the Court's opinion unquestionably should be very much narrowed, and in no event should the conclusions announced be applicable to insurance contracts containing the provisions in question on which contracts the Government has accepted premiums for many years.

Counsel desires to frankly state that some of the grounds on which the validity of the contract provision in question is based and which now appear to him as controlling were overlooked and did not come to his attention until he read a brief by the Solicitor of the Veterans' Administration filed in this Court

on the day the case was argued, which brief counsel urges the Court to read in connection with this motion for rehearing. Printed copies thereof are on file in the Clerk's Office. In the argument in support of this motion we have liberally copied therefrom.

2.

The Court failed to give effect to the statutory provisions empowering the Director of the Bureau of War Risk Insurance (and his successors) to prescribe the terms and conditions of the insurance contracts authorized by the War Risk Insurance Act, and the several Acts amendatory thereof.

3.

The Court failed to give effect to the authority conferred by statute upon the administrative officials to determine and prescribe the character and quantum of proof required to establish maturity of the insurance contract and to make reasonable rules in respect thereto.

4.

The Court failed to give effect to the legislative approval of the aforesaid rules and regulations implicit in the Congressional reenactments, over a period of many years, of various sections of the statute after the promulgation by the proper administrative officers of sundry regulations and instructions construing said sections. This legislative history demonstrates that the Congress approved and adopted the administrative construction in question.

5.

The decision herein is contrary to many prior decisions of this Court with respect to the effect to be given administrative construction of statutes over a long period of time.

6.

The question raised by the Government is not available because by the terms of the statute effective as of April 6, 1917, the insurance contracts (term as well as converted) were incontestable from their respective dates except upon certain grounds specifically enumerated in the statute, and a part of said contract.

7.

That the Court was not clearly informed as to the real question for decision is demonstrated by the fact that the cases cited in that part of the opinion relating to the supposed invalidity of the specific loss provisions in question are not in point on the real question involved, as is hereinafter specifically pointed out.

ARGUMENT UNDER FIRST TO FIFTH POINTS

In the Petitioner's brief and in the oral argument, the undersigned emphasized and probably emphasized too much the theory that because the statute provided that certain specific losses, including the loss of use of one arm and one eye as suffered by the Petitioner, should be considered permanent total disability for compensation purposes that it should be construed to also specifically authorize payment of insurance for such disability. This Court in its opinion in this case handed down March 4, 1935, ruled that this is not the proper construction of the statute. No

further reference to this theory will be made in the following argument which is urged in support of Petitioner's Motion for Rehearing. Counsel sincerely believes Petitioner is entitled to a judgment; but beyond this there is necessarily involved by reason of the broad language of the Court's opinion in this case matters of far more consequence than the question of whether Petitioner does or does not receive the money which he and his attorneys believe the Government owes him under the terms of the insurance contract involved. It is because of the importance of this question to the six hundred thousand or more present holders of Government insurance contracts and to the substantial number of other veterans who will be adversely affected by the opinion quite as much as the importance of the case to the Petitioner which impels us to present with all the earnestness and vigor possible the following reasons which we believe should convince the Court that its opinion ought to be modified. In addition to all other considerations, it is a serious matter indeed for the Court to anounce that over half a million contracts, promises of the United States Government, are unenforceable in whole or in part. The seriousness of this is emphasized when it is recalled that many of the present holders of such insurance contracts cannot procure insurance in private corporations (the contracts of which would contain language similar to if not identical with the question here involved) because in reliance on the Government contract they have permitted the time to pass during which they were insurable risks. Some of them have been paying premiums on the present contracts for fifteen years or more.

Furthermore, every effort should be made to encourage confidence in the promises of the United States Government and not create or increase doubt as to the reliability of the Government in respect to its undertakings. It is no answer to say that everyone is charged with knowledge that the agents of the Government act pursuant to limited powers and that those dealing with such agents must at their peril inquire into the details of the scope of such power. That principle could fairly be applied in respect of a purported contract clearly beyond the power of the agent or to a purported contract to mature or be performed within a limited time, or indeed if the question were raised within a reasonable time after the contract is made. But citizens have the right to rely upon the well settled rule of law often announced by this Court that settled administrative interpretations of statutes will be respected and enforced. That there is and has been such settled administrative interpretation here cannot be denied. It has extended over a period of two decades since the first War Risk Insurance Statute was enacted in 1914. Furthermore, the administrative construction, it is earnestly urged, is in fact correct.

A brief summary of the legislative history we believe demonstrates this.

The original statute enacted September 2, 1914, created in the Treasury Department the Bureau of War Risk Insurance and provided that said Bureau "shall, as soon as practicable, make provisions for the insurance by the United States of American vessels, their freight and passage moneys, and cargoes" against the risks of war (Section 2, 38 Stat. 711).

Section 4 of said Act provided that said Bureau, with the approval of the Secretary of the Treasury, "shall have power to make any and all rules and regulations necessary for CARRYING OUT THE PURPOSES of this Act." 38 Stat. 711.

The original Act was amended June 12, 1917, by Public, No. 20 of the 65th Congress. This amendment enlarged the scope of the insurance to include Masters, officers, or crews of American vessels, as well as vessels, their freights and cargoes. This insurance was to cover against loss of life or personal injury and for compensation during detention following capture by the enemy. 40 Stat. 102.

Section 4 thereof amended Section 3 of the prior Act and authorized the Bureau "to adopt and publish FORMS OF WAR RISK policies and to fix rates of premiums." 40 Stat. 103.

Section 5 added a new section to the prior Act, 3a, which provided that "Such insurance shall provide, * * * In case of death, or permanent disability which prevents the person injured from performing any and every kind of duty pertaining to his occupation, or THE LOSS OF BOTH HANDS, BOTH ARMS, BOTH FEET, BOTH LEGS, or BOTH EYES, OR ANY TWO THEREOF" for the payment of certain sums of money therein stated. 40 Stat. 103.

Paragraph (b) provided that for the loss of one arm 65% of the principal sum should be paid, and for the loss of one eye, 45% of the principal sum; total destruction of hearing 50%, etc. 40 Stat. 103. The Bureau was further authorized to "include in its policy undertakings to pay specified percentages of the principal sum for other losses or disabilities."

It will be noted that the percentage evaluation specified in the statute for the loss of one arm, and one eye, aggregates 110%.

Note that the language in said Section 5 necessarily recognizes that the specific losses therein described do in fact constitute or produce a kind of disability insured against, to-wit: total disability, permanent in nature. In other words, the specific losses described are synonymous with the expression "permanent total disability"; or (as used in Section 5 originally) "permanent disability which prevents * * * performing any and every kind of duty pertaining to his occupation." The citation of authority is unnecessary to support the statement that the two phrases just quoted are synonymous.

On October 6, 1917, there was approved an amendment to said Act of September 2, 1914, which not only extended the insurance to members of the military and naval forces, but provided for compensation and allotments and family allowances for the members of such forces. (Public 90, 65th Congress.) 40 Stat. 398. Section 13 of this Act of October 6, 1917, provided that the director of the Bureau of War Risk Insurance under the general direction of the Secretary of the Treasury should "administer, execute, and enforce the provisions of this Act and for that purpose shall have full power and authority to make rules and regulations not inconsistent with the provisions of this Act necessary OR APPROPRIATE to carry out its PURPOSES, and shall decide all questions arising under the Act, * * *. The director shall adopt reasonable and proper rules to govern the procedure * * * to regulate and provide for the *nature and extent of the proofs and evidence* and the method

of taking and furnishing the same in order to establish the right to * * * compensation, OR INSURANCE provided for in this Act, * * * and the manner and form of adjudications and awards." 40 Stat. 399.

Pursuant to such authority the administrative officers did determine that proof of existence of any of the enumerated specific losses should be the quantum of proof necessary to establish maturity of the contract.

Section 20 appropriated certain sums and provided that "Payments from this appropriation shall be made upon and in accordance with awards by the director." 40 Stat. 400.

Section 400 (being the first section in Article IV of the Act of October 6, 1917) was the basic authorization for insurance to be issued members of the military and naval forces to cover "the death OR TOTAL PERMANENT DISABILITY of any such person." 40 Stat. 409.

Section 402 of said Act required the director to "promptly determine upon and publish the full and exact terms and conditions of such contract of insurance."

Bulletin No. 1 of the Bureau of War Risk Insurance was promulgated by the Director thereof October 15, 1917, pursuant to the afore-mentioned statutory requirements. There was incorporated therein a form of the policy as required which appears at pages 37 to 43 of the brief filed herein by the Veterans' Administration on the day this case was argued. It will be noted that this form provided that the insurance was granted subject to the above-mentioned statutes and *"of any amendments thereto and all regulations thereunder now in force or here-*

after adopted." It did not within its provisions define "total permanent disability," but simply stated that if the insured should become "totally and permanently disabled, *commencing with such disability as established by the award of the director* * * *."

The earliest form of converted insurance policy authorized and promulgated by the Bureau of War Risk Insurance (February 19, 1919) contains in paragraph 9 thereof a definition of "total permanent disability," upon the occurrence of which the contract matured. It is as follows:

> * * * Total permanent disability as referred to herein is an impairment of mind or body due to injury or disease, which will prevent the Insured from following continuously and permanently any substantially gainful occupation. Without prejudice to any other cause of disability, it is further agreed that the entire and irrecoverable loss of the sight of both eyes, or the severance of both hands at or above the wrists, or of both feet at or above the ankles shall be considered as total permanent disability within the meaning of this contract. * * *

In March 1919 the Form of Policy just mentioned was revised somewhat. Paragraph 9 of this revised form defines "total permanent disability" as follows:

> Total permanent disability as referred to herein is any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. Without prejudice to any

other cause of disability, it is further agreed that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet shall be considered as total permanent disability within the meaning of this contract. * * *

This is the Form No. 741, one of those mentioned in Treasury Decision No. 42, dated March 18, 1919, entitled: "Regulation Prescribing the Forms of Application and Policies to be used in the conversion of War Risk Insurance." Said Treasury Decision No. 42 recites that such form (and others therein mentioned) are "on file in the Office of the General Counsel of the Bureau of War Risk Insurance" and authorizes the making of contracts "under terms and conditions set forth therein." A specimen form of this contract is attached to this motion. This was little used in the early period because the "term" insurance was available and the premium thereon consumed much less of the meagre pay of a soldier. So far as the insurance coverage was concerned the "term" and the "converted" policies were identical. Only a "certificate" was issued on the former. A specimen thereof is attached to this motion. A specimen copy of the later form of policy (No. 735) is also attached hereto.

In the meantime, the statute was further amended by Public, No. 151 of the 65th Congress, 40 Stat. 555, approved May 20, 1918; but the above quoted and referred to portions of Section 13 of the Act of October 6, 1917, were reenacted without substantial change so far as the present question is concerned. Public, No. 175 of the 65th Congress, approved June 25, 1918, made sundry changes in various sections of

of the law but Section 402 was reenacted without substantial change so far as the present question is concerned.

On December 24, 1919, there was approved Public, No. 104 of the 66th Congress, 41 Stat. 371, which amended the statute in several respects. But the only change which is possibly relevant to the present question was contained in Section 11 thereof, amending Section 302 of the War Risk Insurance Act by providing (41 Stat. 373):

> That the loss of both feet or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden, shall be deemed to be total and permanent disability * * *.
>
> Congress is deemed to know of the administrative construction of the statutes during the preceding 26 months. Inferentially, it approved such construction.

In April 1920 the aforementioned Treasury Decision No. 42 was amended and new forms were substituted for those bearing the same numbers mentioned in Treasury Decision No. 42 of March 18, 1919,

> "which said new forms, and not those referred to in said Treasury Decision No. 42, shall be used in the conversion"

of the term insurance. The Form 741 filed with and referred to in said revised Treasury Decision 42 contained the following language in paragraph 9 thereof:

"Total permanent disability as referred to herein is any impairment of mind or body which continuously renders it impossible for the disabled person to follow any substantially gainful occupation and which is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it * * *. *Without prejudice to any other cause of disability, it is agreed* that the irrecoverable loss of the sight of both eyes, or the loss of both hands, or the loss of both feet, *or the loss of one hand and one foot,* shall be considered as total permanent disability within the meaning of this contract; * * *.

Although Congress has legislated on the subject frequently during the past fourteen years, there has been no statute indicating any dissatisfaction of the Congress with the terms of said contracts so promulgated by the Administrator pursuant to the directions contained in the statutes. There has been no narrowing of the language quoted in any of the thousands of contracts of insurance subsequently issued. Hundreds of claims have been asserted under such contracts, as well as under the term insurance which by virtue of the regulations promulgating the details of the contract, were to the same effect as the converted insurance contracts in this respect. At the present time the Veterans' Administration is paying, pursuant to administrative determination or judgments, 615 claimants under term insurance and 108 claimants under the converted insurance contracts for these so-called specific losses. These veterans have been paid in some instances over a period of many years, some of them since they were wounded during hostilities. Payments have been made in good faith by

the Disbursing Officers, audited and approved by the Comptroller General, and no effort made to perpetuate the evidence on which recovery might now be had on the basis suggested in the Court's opinion herein. If this opinion stands as announced, it is entirely conceivable that claim will be made against the Disbursing Officers for the moneys heretofore paid, against the sureties on their official bonds, and efforts also made to collect from these grieviously disabled veterans the sums heretofore paid them over a period of years pursuant to adjudications by the administrative officers of the Government. If gross injustice and mischievous results flow from a late construction of a statute differing from the long continued construction thereof by the administrative officers whose duty it is primarily to construe the same, those are additional reasons for strictly adhering to the well settled rule of this Court that the administrative constructions will be followed. Particularly is this true where Congress has legislated again and again on the subject without disturbing or changing in anywise such long continued administrative constructions. It is submitted and respectfully insisted that by reason of the legislative history of this matter Congress has approved and adopted, and in effect directly authorized, the language in dispute with reference to such specific losses under both term and converted insurance contracts.

On July 21, 1920, Regulation No. 54 was promulgated by the Bureau of War Risk Insurance, the first paragraph thereof providing that "awards of insurance and compensation shall be based upon the same standards." The remainder of the order relates to other procedural matters within the Bureau.

Regulation No. 57, promulgated by the Bureau of War Risk Insurance November 26, 1920, so far as material here, is copied on page 38 et seq. of the Solicitor General's brief. Attention is particularly invited to paragraph VII of said regulation, which provides that *awards of insurance may be "made in accordance with the provisions of paragraph IV" of such regulation.* Said paragraph IV is in subdivision B of the regulation. It reads:

> IV. For compensation purposes a disability from an injury or disease shall be rated as total and permanent under any of the following conditions:
>
> (a) When a statutory total permanent disability entitles a person to such rating, viz, loss of both feet or both hands, or the sight of both eyes, or the loss of one foot and one hand, or one foot and the sight of one eye, or one hand and the sight of one eye, or becoming helpless and permanently bedridden.
>
> (b) .....
>
> (c) .....

Said regulation was approved by D. F. Houston, Secretary of the Treasury, on November 26, 1920.

A noteworthy circumstance in connection with this question is that for many years, with many officials considering the question from various angles, no one has entertained any doubt that as a matter of actual fact any person who suffered any of the *specific* losses mentioned in Regulation 57, or who had become "helpless and permanently bedridden," was, and necessarily must be, "totally and permanently disabled" for all purposes. It will be noted also that the conditions described in subparagraph (a) of para-

graph IV of said Regulation No. 57 are the identical conditions "deemed to be total and permanent disability" by the terms of paragraph 3, Section 302, of the War Risk Insurance Act as amended by Section 11 of Public, 104, 66th Congress, approved December 24, 1919.

This *fact,* however, does not support a *conclusion* that these specific losses were recognized to constitute "total permanent" disability for the reason that they were *also* recognized as applicable to compensation and were embodied in that portion of the statute relating to compensation. It is quite as reasonable to conclude they were so recognized for insurance purposes because they obviously did, as a matter of general knowledge and experience, produce such disability in one so afflicted. Common sense and the statute probably operated concurrently.

But, in any event, if the Director adopted for the purpose of insurance contracts the same standard of measurement for specific disabilities which Congress adopted for compensation purposes, it cannot be said the Director's determination was unreasonable. If reasonable, it was certainly within his power.

Evidently the then Director of the Bureau of War Risk Insurance followed the well-settled construction of the expression "total permanent disability" as reflected in numerous decisions by the State and Federal courts prior to the enactment of the statute under consideration.

Public No. 47, of the 67th Congress, approved August 9, 1921 (42 Stat. 147), created the Veterans' Bureau, and by Section 3 thereof

> The functions, powers, and duties conferred by existing law upon the Bureau of War Risk Insurance are hereby transferred to and made a part of the Veterans' Bureau * * * (42 Stat. 148).

Section 404 of Public No. 47 relates to the conversion of the term insurance theretofore written *"into such form or forms of insurance as may be prescribed by regulations and as the insured may request."* Throughout said Act large discretionary powers are vested in the Director of the Veterans' Bureau and extensive authority is granted to him with respect to the promulgation of regulations pertaining to the subject matter within his jurisdiction.

Here again after the administrative practice in question was well established Congress not only implicitly but expressly approved the existing practice. We respectfully insist that the specific loss provisions became a part of the contract, and with the approval of the Congress, quite as much as if the statute had expressly provided that the forms of policies then in use were to constitute the contract.

Pursuant to the authority contained in said Act of August 9, 1921, the Director of the Veterans' Bureau, on September 12, 1921, promulgated "Veterans' Bureau Regulation No. 4." Its terms, so far as this question is concerned, are the same as subparagraph (a) of paragraph IV of said Regulation No. 57. The first sentence of paragraph VII of Regulation No. 4 is identical with the corresponding sentence in Regulation No. 57.

Section 300 of the World War Veterans' Act, approved June 7, 1924, (Public 242, 68th Congress, 43

Stat. 607, 38 U. S. Code 193 et seq.) relates to insurance and is in substantially the same language as the prior Acts, so far as this question is concerned.

Section 301 provides that all term insurance shall be converted not later than July 2, 1927, into such *"form or forms of insurance as may be prescribed by regulations and as the insured may request."*

Public No. 448 of the 69th Congress, approved July 2, 1926 (44 Stat. 790), amended the World War Veterans' Act in several respects but Section 300 in which is described the disability insured against uses the same words as used throughout viz: "total permanent disability."

Again Congress approved the practice which had been in existence for years and it must be borne in mind that the World War Veterans' Act of 1924 followed extensive hearings and investigations on the entire subject of veterans' relief and veterans' insurance and that Act in effect was a codification of what Congress deemed appropriate after a complete overhauling of all existing legislation on the subject of World War veterans. This is significant, and negatives the thought that there may have been any oversight by the Congress in connection with the present subject.

This Act also amended Section 202, and added a specific loss to those enumerated in Section 202 as it appeared in the Act of June 7, 1924, quoted above, to wit: "the organic loss of speech."

Sections 202 and 301 were again amended by Public No. 585 of the 70th Congress, approved May 29, 1928 (45 Stat. 964), but the same description of the loss insured against to wit, "total permanent disability" was used and the language of Section 301, with

respect to the forms of insurance, being those prescribed by regulation, remained unchanged.

Public 522 of the 71st Congress, approved July 3, 1930 (46 Stat. 991), again amended the World War Veterans' Act in sundry respects. The first Section of that Act amends Section 5 of the Act of June 7, 1924, and as amended it reads:

> "The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and SHALL DECIDE ALL QUESTIONS arising under this Act * * *." There was an exception, permitting suits on insurance contracts.

The specific losses (amputations, blindness, etc.) enumerated in the World War Veterans' Act of June 7, 1924, and the amendments thereto, as indicated above, are identical with the specific losses enumerated in Section 3122 of the Veterans' Bureau Regulations, pertaining to converted insurance, and 3140 thereof, pertaining to term insurance. These Regulations were promulgated in March 1930.

They were in substance the same as all of the preceding regulations so far as the principle is concerned, the various changes during the preceding decade being largely verbal except at different periods different combinations of specific losses were prescribed. The administrative officers were entitled to believe that these regulations were in accord with the intention of the Congress in view of the fact that

with full knowledge of the well established practice which had then existed for more than a decade Congress reenacted the insurance provisions without substantial change so far as this question is concerned.

It is apparent that the genesis of all these specific loss provisions was the Act of June 12, 1917 (40 Stat. page 102) amending the War Risk Insurance Act of September 2, 1914, and providing for payment of the principal sum or certain portions thereof to seamen on merchant vessels who suffered similar specific losses; plus the exercise by the Director of the authority vested in him to determine the terms of the contract. He determined that these specific losses which the Congress had previously said constituted permanent total disability in connection with other matters and which as a matter of general knowledge did and do constitute such disability should expressly be recognized so to do. Having recognized that fact it was so provided in the contract and we respectfully insist it was properly so provided therein.

It should be reiterated here that the fact that Congress concluded certain specific losses constituted permanent total disability for compensation purposes and that the Secretary of the Treasury and his successors reached the same conclusion with respect to the same specific losses in dealing with the subject of the insurance contracts, does not demonstrate that the latter conclusion was reached because of the former, nor is it believed that if it were reached for that reason that fact would mitigate against the validity of the specific loss provisions in the insurance contracts.

Nowhere in any of the numerous changes in Regulations, the numerous amendments and reenactments of various statutes on the subject, or in the several re-

visions of the insurance contracts themselves, or in the legislative or administrative history in connection with any of these changes, does there appear to have been at any time during the period of approximately twenty years since the first enactment on the subject, any doubt in the mind of any official concerned with the subject as to the legality and propriety of the provisions now under discussion, to wit, the specific loss provisions in the insurance contract.

Aside from any purely technical or abstract reasoning that may be indulged in, it is submitted that it is not the function of any Court upon a review of administrative action to simply substitute its judgment for that of the administrative officer in matters with respect to which discretion has been confided in him. That principle is well settled by decisions of this Court, as well as all other courts which have ever passed on the question. To hold such administrative regulations invalid it must appear that it was *clearly* beyond the power of the Administrator under the statute or that it was action involving the arbitrary exercise of a power. It is clear that the practical functioning under a statute is to be considered by the administrative officers charged with its interpretation and enforcement, as well as the purely abstract principles involved. It is submitted that there is nothing unreasonable in the administrative interpretation now under attack. No one would seriously question the propriety of instructions to rating boards to the same effect, e.g., if you find this condition or that condition of health to exist you will deem the evidence sufficient and will not look further. There is no difference in substance or effect. All persons would say without any hesitancy that in practically

all cases one suffering the loss of both legs, the sight of both eyes, or of one leg and one arm, etc., is in fact totally disabled. This is true notwithstanding the fact that occasionally one so afflicted but who is endowed with very exceptional talents may be able to compete with his fellows and earn some sort of a living, and occasionally one is found who earns a reasonable living. But there is only one Helen Keller and her accomplishments cannot be used as a practical measuring rod in handling hundreds of thousands of insurance claims. Nor is it any answer to the proposition just indicated to say that some blind men operate cigar stands in public buildings and presumably live on the income therefrom. Their capital and the opportunity to so utilize it is the dominant factor in such cases, not their personal effort. If the provision is reasonably within the scope of the statutory authority, which is very broad, or if there be reasonable doubt about its being within the scope of such authority, then the provisions in these contracts are valid and this Court should so hold.

The other provision contained in the specific loss section of the Government insurance contract, to wit, "becoming permanently helpless or permanently bedridden," hardly calls for comment except to say that one could not imagine any case where an insured so afflicted would not be entitled to recover on an insurance contract insuring against total permanent disability, quite aside from the incorporation of any such language in the contract.

It is believed that so far as the scope of the risks covered is concerned there is no difference between the present situation and that intended to be created by the early enactments of Congress pertaining to

insurance (term insurance). In short, "the insurance" about which Congress legislated more or less continuously from 1914 to 1930 was a contract relating to that type of relationship generally understood as created and existing between the insurer and the insured with respect to the "coverage," or subject matter of the insurance contract. "Total permanent disability" had a fairly well defined and understood meaning not only by reason of general use of the term but also because of judicial construction thereof in sundry cases decided prior to the World War. As a general rule and particularly if the insured is suffering from some affliction within the body, the term is more or less flexible. Certain conditions, however, so generally incapacitate those suffering therefrom that reasonable men did not and do not differ on the question of whether such conditions in fact produce "total permanent disability." The expression has been so often discussed and defined that we will not burden the Court further in respect thereto. If it should be conceded that occasionally some very exceptional person, with exceptional mental endowment and exceptional economic opportunity, may possibly produce some income notwithstanding he is totally blind or has lost both legs or one arm and one eye, or has suffered some of the other afflictions indicated in the specific loss provisions of the contract, nevertheless we are dealing with a practical and not a theoretical or abstract problem. It seems entirely clear that Congress intended for a contract to be made for practical purposes. It follows that the terms therein, the construction thereof, and the adjudication of claims arising thereunder should be reasonable, businesslike, and practical.

It is submitted that under the broad authority and power granted to the Secretary of the Treasury in the earliest enactments, and to his successors by the later enactments, it is entirely clear that such officials could properly make the contracts they did make, and which included the so-called "specific loss provisions"; and further, that without any such provisions in the contracts, such officials could properly have adjudicated claims upon the standards indicated. Some standard for the guidance of the subordinates actually doing the rating was and is indispensable. In the last analysis the enumeration of these specific losses, so called, is nothing more nor less than laying down a rule of measurement found by experience to be substantially accurate. That it is incorporated in the contract, in the Regulations or in certain internal instructions or general orders, is a detail of no importance so far as the principle involved is concerned.

But even if it were believed that the construction of the various statutes by the several officials primarily charged with the duty of construing and administering them over a period of years was erroneous, such construction having been uniformly given by these various administrative officials and having been applied in hundreds of thousands of cases and incorporated in over half a million contracts now outstanding and in force, it is well settled law that such construction will be adhered to and adopted by the Court, as has been held in many cases. A few citations will suffice.

In the case of *Hahn* v. *United States,* 107 U. S. 402, the Appellant sought to recover a share in certain fines and forfeitures accruing at the Port of New York and his right thereto turned primarily upon the proper constructions of a statute enacted in 1867. Under the construction thereof which had been adopted and followed by the Treasury Department, he was not entitled to participate in such fines, etc. This Court approved the reasoning and conclusions of the Court of Claims which emphasized the fact that Congress

> had not interfered with such constructions by the Secretary of the Treasury while the Act was in force.

This was in accord with the cases of *United States* v. *Pugh,* 99 U.S. 265, wherein this Court in the course of its opinion observed—

> In the case of a doubtful and ambiguous law the contemporaneous construction of those who have been called upon to carry it into effect, is entitled to great respect.

In *United States* v. *The Alabama Great Southern Railroad Company,* 142 U. S. 615, the controversy involved the proper construction of a statute relating to concession in the price for transporting mails where the carrier had received land grants from the Government. The Post Office Department had construed the statute in a certain manner, which construction was followed from 1876 to 1885 by three Postmasters General. Then a new Postmaster General sought to change the construction and this Court

denied his right so to do and held in favor of the carrier. In the course of the opinion (page 621), it is said:

> We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that Department; a construction which, though inconsistent with the literalism of the Act, certainly consorts with the equities of the case, should be considered as decisive in this suit. It is a settled doctrine of this Court that in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be ACTED UPON FOR A NUMBER OF YEARS, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced. * * *

In *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission,* 200 U. S. 361 (at 401), this Court clearly indicated that notwithstanding the fact that it might disagree with the construction of the statute in certain particulars, nevertheless, since the rulings had been made by such Commission during "the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the 'Act to Regulate Commerce' is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; * * * We make this concession because we think we are con-

strained to so do, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, AND HAS BEEN IMPLIEDLY SANCTIONED BY THE REENACTMENT OF THE STATUTE WITHOUT ALTERATION IN THE PARTICULARS CONSTRUED, when not plainly erroneous, must be treated as read into the statute" (page 402).

In *National Lead Company* v. *United States,* 252 U. S. 140, this Court again recognized the binding effect of the administrative construction of a statute extending over a substantial period of time. A "draw back" under the customs act was there involved. In the course of the opinion, after restating the rule above indicated, this Court said:

> To this we must add that the department's interpretation of the statute has had such implied approval by Congress, that it should not be disturbed * * *. The draw back provision under which the construction complained of originated, continued unchanged from 1861 until the revision of the statute in 1870 and the Court of Claims finds that the rule for determining the draw back on oil cake was applied during the whole of that period of almost ten years * * *. The reenacting of the draw-back provision four times without substantial change, while this method (i.e. departmental formula) of determining what should be paid under it was being constantly employed, amounts to an implied legislative recognition and approval of the executive construction of the statute. * * * (Citing cases) * * * for Congress is presumed to have legislated with knowledge of such an established usage of an executive department of the Government.

Attention is invited to the fact that the Secretary of the Treasury and his successors uniformly construed the insuring provisions in question from the beginning of operations under the Act of October 6, 1917, amending the original War Risk Insurance Act of September 2, 1914, as will be noted from the detailed history of the legislation hereinabove pointed out. Congress legislated on this subject almost continually. Various Sections of the Statute affecting the subject matter presently in issue were from time to time amended and rewritten. But nowhere has Congress during the intervening period of nearly twenty years indicated, directly or by implication, that the construction by the Secretary of the Treasury, and by the administrative officers successively performing the functions originally vested in the Secretary under the War Risk Insurance Act, was erroneous or contrary to the congressional intent. On the contrary, the terms of the contracts of insurance, as determined upon and adopted by the Bureau of War Risk Insurance and its successors, have received the sanction of legislative approval by Congress by virtue of the successive reenactments of the various sections of the statute after the construction thereof now questioned had been adopted by the administrative officials.

Express approval by Congress, and express confirmation of power vested in the Director (now Administrator) is manifested by the July 3, 1930, amendment to Section 5 of the World War Veterans' Act. (Section 1, Public 522, 71st Congress, 46 Stat. 991.)

The first sentence of that section as amended July 3, 1930, reads:

SEC. 5. The director, subject to the general direction of the President, shall administer, execute, and enforce the provisions of this Act, and for that purpose shall have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, which are necessary or appropriate to carry out its purposes, and shall decide all questions arising under this Act; and all decisions of questions of fact AND LAW affecting any claimant to the benefits of Titles II, III, or IV of this Act shall be conclusive except as otherwise provided herein. * * *

The language is identical with the original Act of June 7, 1924, except that the words "and law," appearing in capitals in the above quotation were added by the Act of July 3, 1930. It is believed the power and the right now asserted clearly existed theretofore, but if there existed any doubt on that point, certainly all such doubt was removed upon the approval of said Act of July 3, 1930.

Clearly, somebody was charged with the duty of determining the exact terms of the contract by Congress authorized and which was to be sold to several million men, comprising the military and naval forces of the United States. The power and authority to determine these terms of the proposed contract was vested in the Secretary of the Treasury (Bureau of War Risk Insurance). Necessarily, the exercise of such power involved some considerable discretion. The purpose, as declared by Congress, was to insure against two certain contingencies, one described in very general terms. The happening of those contingencies necessarily had to be determined; and in cases of disability, the extent thereof ascertained. In

the nature of things determination in the individual cases must be done by numerous subordinate officials and employees. It should not be left to the mere whim or the individual opinion of such adjudicating personnel. Certain more or less definite rules of measurement were indispensable. These rules, the Secretary of the Treasury and his successors determined upon and promulgated as contemplated and provided by Congress, and such rules became, were, and are those reasonable "rules and regulations not inconsistent with the provisions of this Act necessary or APPROPRIATE to carry out its PURPOSES," authorized by Section 13 of the Act of October 6, 1917. (40 Stat. Part 1, 398.)

They and their amendments, whether incorporated in regulations, denominated as such, or in the "policy" or contract, constituted the reasonable "rules and regulations" authorized in the successive acts from 1917 to the present which dealt with the subject matter of the present litigation. The reasonableness of the specific loss provision promulgated by the Secretary and his successors is illustrated by the fact that Congress provided, in dealing with such specific losses in the case of seamen (in the Act of June 12, 1917, 40 Stat., Part 1, page 102), that 65% of the principal sum of the insurance contract should be payable for the loss of one arm and 45% thereof for the loss of one eye. During the many years this insurance has been in effect, and in spite of the numerous cases disposed of administratively and as the result of litigation, the validity of the so-called "specific loss provisions" of the insurance contract has not heretofore been questioned. In the opinion of the Circuit Court of Appeals for the Sixth Circuit in *United States* v.

Cole, 45 F. (2) 340, they were *assumed* to constitute part of the contract.

The rule indicated by this Court in numerous decisions, a few of which have been cited, has been recognized as applicable to the administrative practice of the Veterans' Bureau (Successor to the Bureau of War Risk Insurance). Attention is invited to page 146, volume 35, Opinions of the Attorneys General of the United States, where, in an opinion by the Attorney General, it is stated:

> "* * * I am informed that the Veterans' Bureau has construed compensation remaining uncollected to which a veteran is entitled at the time of death or permanent total disability as including compensation which is uncollectible at that time because of section 210, and has acted upon this construction in a large number of cases.
>
> If the construction placed upon a statute by the Department charged with its administration is not clearly erroneous, and has been followed in many cases, it should be respected and not overruled except for cogent reasons. * * *"

On February 28, 1933, the Attorney General addressed an opinion to the Administrator of Veterans' Affairs, relative to the naval pension payable under Sections 4756-7 of the Revised Statutes. In the course of this opinion the Attorney General stated:

> I have examined the question on the merits and it is obviously a debatable one. * * * I have adhered very strictly to the rule that wherever there is room for reasonable differences of opinion as to the meaning of a statute, long and consistent administrative interpretation of it by the officers charged with the duty of

> administering it should be followed. I have repeatedly urged that contention before the courts in Government litigation. It is undesirable from many points of view to overturn long-continued administrative practices based on an administrative construction of a statute. It appears in the present instance that the practical construction heretofore followed has been adhered to for a number of years and that *the Congress has not been dissatisfied with it or seen fit to modify it by legislative enactment.* * * *

The rule was recognized as late as 1932 and applied by this Court to certain Circuit Court rules relating to the assignment of United States Judges. *Johnson* v. *Manhattan Railroad Company,* 289 U. S. 479.

The regulations as promulgated, and certificates or policies of insurance issued by the Bureau of War Risk Insurance, and its successors, specifically recited that the maturity thereof because of the occurrence of "total and permanent disability" would be recognized to exist if and when the insured suffered certain specific disabilities from time to time enumerated in the contracts themselves or in regulations or instructions issued by the Director. This was in accordance with the terms of the statutes and of Bulletin No. 1, promulgated by the Bureau of War Risk Insurance October 15, 1917. All such changes, therefore, became embodied in all insurance contracts issued by the Bureau, irrespective of the date of issue.

The various regulations so far as material are printed in the appendices to the brief heretofore filed by the Veterans' Administration and the "Brief for the United States" filed by the Solicitor General.

The Court is respectfully referred thereto inasmuch as those exhibits have not been reprinted in connection with the Motion in view of the cost thereof.

It is respectfully insisted that the specific loss provisions in question are valid because:

a. Of the statutory authority extended to the Director of the Bureau of War Risk Insurance and his successors, to prescribe the terms and conditions of the insurance contracts.

b. They are within the authority extended by the statute to said administrative officials to prescribe the character and quantum of proof required to establish maturity of the insurance and to make reasonable rules in respect thereto.

c. The Congress has over a period of more than 15 years legislated again and again on the subject in the light of the current administrative interpretations and thereby approved and adopted the same as part of the statute.

ARGUMENT UNDER SIXTH POINT

There is another basis for sustaining the validity at this time of the specific loss provisions in both the term and the converted insurance contracts. Section 307 of the World War Veterans' Act, as amended by Section 24 of Public 522, approved July 3, 1930 (46 Stat. 991) provides:

"All contracts or policies of insurance HERETOFORE OR HEREAFTER issued, reinstated, or converted, SHALL BE INCONTESTABLE FROM THE DATE OF ISSUANCE, reinstatement, or conversion, except for fraud, nonpayment of premiums, or

> on the ground that the applicant was not a member of the military or naval forces * * * this section shall be deemed to be effective as of April 6, 1917, and APPLICABLE FROM THAT DATE to ALL contracts or policies of insurance."

Said section by its terms is subject to Section 23 of the World War Veterans' Act. So far as material Section 23 provides:

> "* * * no compensation or insurance shall be payable for death inflicted as a lawful punishment for crime or military offense, except when inflicted by the enemy * * * the discharge of a person for having concealed the fact that he was a minor at the time of his enlistment shall not bar him from the benefits of this Act * * * this section shall be deemed to be in effect as of April 6, 1917 * * *."

Formerly Section 307 provided that the insurance should be incontestable "after the insurance *has been in force six months* from the date of issuance or reinstatement * * *," and also that a letter mailed by the Bureau should constitute a contest. This latter provision undoubtedly was incorporated to meet the decision of this Court in *Hurni Packing Company* v. *Mutual Life Insurance Company*, 263 U. S. 167; 68 Law Ed. 235. It was therein held that the contest must be initiated within the period provided in the policy, notwithstanding that death occurred prior to the expiration of such period. But said provision for a letter of contest was eliminated when Section 307 was amended in 1930, as indicated above.

As far as we can discover there is only one decision in the United States directly in point, presumably because the conclusion therein indicated is so mani-

festly correct that counsel for other insurance companies never thought it worthwhile to litigate the question. We refer to *Mutual Reserve Fund Life Association* vs. *Austin*, decided by the Circuit Court of Appeals for the First Circuit in December, 1905, 142 Fed. 398. Suit was brought to recover the face amount of a life insurance contract which contained this provision:

> "If this policy of insurance shall have been in continuous force for three years from its date, it shall therafter be incontestable except for nonpayment of premiums * * * or for misstatement of the age * * *."

It also contained a provision as follows:

> "This contract shall not take effect until this policy is delivered to the member in person during his lifetime and while in good health, nor until the first payment is paid in cash hereon while said member is also in good health."

The undisputed facts showed that the deceased insured was not in good health at the time the contract was delivered to him. He died nore than three years after the date thereof. Judgment for plaintiff was affirmed. The Court said (Page 401):

> "The term incontestable is of great breadth. It is the policy which is to be incontestable. We think the language broad enough to cover all grounds for contest not specially excepted in that clause. * * * The word policy may well be taken to mean a formal document delivered by the company and containing evidence of an obligation to pay * * *."

It will be observed that Section 307 above provides that "all contracts or policies of insurance * * * shall be incontestable from the date of issuance." Formerly in the 1924 Act the language read: "shall be incontestable after the insurance *has been in force six months* from the date of issuance * * *," practically the same language as in the Austin case cited.

This change in the language in 1930 indicates an intention by the Congress to liberalize the incontestable provision so as to make it more desirable to the insured. It also is further evidence of Congressional approval of the then existing terms of the insurance "contracts or policies" which had long been in existence pursuant to the administrative officers' determination thereof.

In the case of *Northwestern Mutual Life Insurance Company* v. *Johnson*, 254 U. S. 96; 65 Law Ed. 155, this Court affirmed a judgment for the plaintiff, beneficiary under two life insurance policies. Payment was contested on the ground that the insured suicided. The language most favorable to the insurer was:

> "If within two years from the date hereof the said insured shall * * * die by his own hand * * * this policy shall be void."

The other policy provided:

> "This contract shall be incontestable after one year from the date of its issuance provided the required premiums are duly paid."

After pointing out that the case of *Ritter* v. *Insurance Company* 169 U. S. 139, had been modified by the decision in *Whitfield* v. *Insurance Company,* 205 U. S. 489, this Court, answering a certified question, held the insurer was liable under both contracts. The insured had suicided at a date more than two years after the first policy and more than one year after the second policy was issued. The Court said:

> "The object of the clause is plain and laudible—to create an absolute assurance of the benefit as free as may be from any dispute of fact except the fact of death and as soon as it can reasonably be done."

It further held that the two quoted clauses were the same in effect and that each policy was incontestable after the period stated therein.

It seems clear that under the express terms of the statutes cited providing that these policies should be incontestable from their dates that it is not now open to the insurer (the United States) to contest the validity of the specific loss provisions. And it will be noted that the incontestable section of the statute is expressly made effective as of April 6, 1917.

ARGUMENT UNDER SEVENTH POINT

The Court cites several cases in its original opinion herein. But it is believed the principle announced in those cases is inapplicable here for the reasons hereinafter indicated as to each of such cited cases.

The case of *United States* v. *200 Barrels of Whiskey,* 95 U. S. 571, 576, construed the forfeiture

provisions contained in two separate sections of a Revenue Act. Under one section the whiskey contained in the unstamped container was forfeited by reason of the failure to stamp such container. Under another section of the Act all the whiskey on the premises under certain circumstances was to be forfeited. The Commissioner issued certain regulations which it was claimed authorized the destruction of all the whiskey if any of it was found in an unstamped container. Obviously, such regulation was not construing the law at all but was in effect repealing the limited forfeiture section and making the general forfeiture section applicable in the unstamped container cases, and this in the face of the statutory provision that if that were the only offense the forfeiture should be limited to the contents of such container. Incidentally, that case involved a highly penal statute, a forfeiture of the citizens' property and naturally the statute should and would be strictly construed.

In *Morrill* v. *Jones,* 106 U. S. 466, 467, there was involved the validity of a customs regulation to the effect that before admitting certain alleged breeding animals free of duty the Collector must "be satisfied that the animals are of superior stock, adapted to improving the breed in the United States." The statute provided for free importation of male animals if they were "imported for breeding purposes." Plaintiff imported certain animals "for breeding purposes" but the Collector thought that these animals were not of superior stock and were not adapted to improving the breed in the United States and, therefore required payment of duty. The im-

porter brought this suit to recover the amount so paid under protest. Here again it is perfectly obvious that the regulation directly and materially changed (by limitation) the statutory provision in two respects:

a. The Collector must be satisfied that the animals were of superior stock, and
b. Were adapted to improving the breed.

In *Campbell* v. *Galeno Chemical Co.*, 281 U. S. 599, 610, there was involved the validity of an attempted action by the Commissioner of Internal Revenue purporting to terminate alcohol permits of various concerns. Such permits were issued under the provisions of the National Prohibition Act and were continuous in effect until certain violations by the permitees. The Commissioner promulgated a regulation purporting to terminate the permits on a certain date and changed the scheme to one involving periodical procuring of permits. This again is in the nature of a penalty statute and has no application to our situation, since it did not involve the *construction* by the Commissioner of the statute or the prescribing of any duties in accordance with any section of the statute but simply *undertook to terminate a right* theretofore secured by the plaintiffs pursuant to the statute.

In *United States* v. *Grimaud*, 220 U. S. 506, this Court reversed a judgment which had sustained demurrer to an indictment returned against the defendant for grazing stock in Public Forests without first procuring a grazing permit from the Secretary of the Interior as required by a statute. The sole point decided in that case was that Congress had the power

to create a criminal offense and provide a penalty therefor which offense should consist of violating a rule or regulation to be issued by the administrative officer having jurisdiction over Public Forests. These rules pertained to the number of sheep, goats or cattle that might be grazed in a given area and under what circumstances, etc. It is submitted the decision does not bear on the present problem at all. If any inference applicable to this case could be drawn from that decision it would seem to be that Congress had the power to confer upon the Administrator of Veterans' Affairs the right to prescribe the terms of the insurance contracts in question. Obviously, it did have such power and that has not been questioned. We submit most earnestly that he has exercised the power within its scope and that in the exercise thereof such administrative officer determined that one of the terms and conditions of the contract should be the so-called specific loss provision. We further insist that such provisions are valid, whether called in question with respect to the term insurance or the so-called converted insurance.

The conclusion is irresistible that such specific loss provisions in said contracts and in the regulations and instructions on such subject were and are valid. This Court, therefore, should grant this motion for rehearing and so hold.

Respectfully submitted.

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Attorneys for Petitioners

The undersigned attorneys of record for Madison L. Miller, Jr., the Petitioner in the above entitled cause, hereby certify that the foregoing Motion for Rehearing on behalf of said Petitioner is presented in good faith for the purpose of seeking correction by this Court of the errors which the undersigned believe were committed to the prejudice of Petitioner and same is not presented for purposes of delay. This certificate is made pursuant to Rule 33 of this Court.

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Petitioner.